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July 25, 2012

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20554

RE: Applications of Cellco Partnership d/b/a
Verizon Wireless, SpectrumCo LLC, and Cox
TMI Wireless, LLC For Consent To Assign
Licenses; WT Docket No. 12-4
Notice of *Ex Parte* Communications

Dear Ms. Dortch:

On July 23, 2012, Charles McKee, Vice President, Government Affairs; Lawrence Krevor, Vice President, Government Affairs, and Trey Hanbury, Director, Government Affairs,¹ of Sprint Nextel Corporation (“Sprint”); Steve Salop of Charles River Associates, Outside Advisor to Sprint; Antoinette Cook Bush and the undersigned of this firm, Outside Counsel to Sprint, met with Sean Lev, General Counsel; Bill Lake, Chief of the Media Bureau; Marius Schwartz, Chief Economist; Senior Deputy Chief James Schlichting, Rick Kaplan, Susan Singer, Joel Taubenblatt and Peter Trachtenberg of the Wireless Telecommunications Bureau; Joel Rabinovitz and Jim Bird of the Office of General Counsel; Sarah Whitesell and Ty Bream of the Media Bureau; and Paul Lafontaine of the Office of Strategic Planning & Policy Analysis.

The Sprint representatives discussed the potential effects on Sprint’s business and harms to competition that will likely result from the transaction among Verizon Wireless (“Verizon”), Comcast Corp., Time Warner Cable Inc., Bright House

¹ Mr. Hanbury participated by phone.

Networks, LLC, and Cox TMI Wireless LLC (the “Cable Companies”), in the form of blocked or discriminatory wireline network access, including WiFi broadband networks and backhaul for small cells. Although Sprint has not formally opposed the proposed sale of wireless spectrum by the Cable Companies to Verizon, there are certain specific conditions to the transaction that would serve the public interest by countering the loss of effective competition that would follow from the spectrum sale and its associated “Commercial Agreements.”

1. Verizon and local Cable Companies have a duopoly in their overlapping territories over broadband wireline network access, an essential input to Sprint’s business.

Sprint’s representatives explained that in the various areas where affiliates of Verizon are the Incumbent Local Exchange Carriers (“ILECs”), there is an effective duopoly of Verizon and the local cable operator in their overlap areas for providing broadband wireline network access to consumers, businesses, and to wireless carriers like Sprint. Broadband wireline network access is an essential wireless input because, among other things, it is required to support WiFi and small-cell components of the heterogeneous networks that all wireless carriers will need to maximize spectrum efficiency, maintain network quality, and remain effective competitors in the future. Without the added capacity, coverage, and speed created by such heterogeneous networks, a wireless carrier would be unable to support growing demand for data communications and the quality of its network would be degraded.

As consumer data tonnage explodes, wireless carriers will require heterogeneous networks to increase capacity. Heterogeneous networks include small cells such as femtocells and picocells, which require backhauling wireless traffic with wireline broadband facilities. The same is true of access to WiFi facilities, which depend on duopoly broadband backhaul to provide a data traffic offload capability from wireless macro-networks.

Sprint has been on the leading edge of building a heterogeneous network. It has already added 950,000 femtocells to its network, which provide stronger signals and faster data speeds. Sprint’s customers install the femtocells in their home by connecting them to their personal wired broadband connections, which customers usually obtain through their ILEC or cable company.

Sprint has also added capacity to its network with picocells, which require broadband wireline network access that Sprint purchases as backhaul. Picocells are an attractive option to add wireless capacity because they are less expensive than

traditional cell sites, and can be added where traditional cell sites are impractical, thereby making it possible to improve in-building coverage, overcome terrain obstacles and bring stronger signals and capacity to targeted high-demand venues. However, Sprint's ability to add picocells depends on Sprint obtaining the necessary backhaul at prices that make its buildout economically feasible.

Wireless carriers will also require network offload to WiFi systems to meet future demand. Because of the relative cost of wireless service plans, customers prefer to transfer their wireless use from licensed spectrum to WiFi connections where they are available. Therefore, for Sprint to remain an effective competitor, its customers must be able to connect to personal and public WiFi with Sprint devices. However, unlike Verizon and AT&T, which may build WiFi networks using their subsidized wireline facilities, Sprint and the smaller mobile carriers cannot build WiFi networks of their own.

2. Elimination of competition in the provision of broadband wireline network access would significantly raise the costs and/or reduce the quality of service provided by Sprint and the other small wireless competitors.

The only potential competition to the ILECs for small-cell backhaul facilities are the cable companies. Sprint's representatives explained that if the Cable Companies and Verizon were to stop competing in the provision of broadband wireless network access within their overlap areas, or were to compete less vigorously, Sprint's costs would rise materially. As an essential input, the monopoly price of broadband wireline network access surely far exceeds the current market price. If Sprint cannot economically build its network capacity using small cells because of prohibitive prices or a refusal to deal, the quality of its network will suffer significantly.

Virtually any merger that creates a monopoly is presumed to lead to substantial price increases. Where, as here, demand is inelastic because the service is essential, the price increase will be limited only by regulation or the amount the buyer is able to pay before simply resigning to the consequences of forgoing the essential service.

In addition, the only available broadband wireline network access for femtocell and WiFi access for Sprint customers are the ILECs and the cable companies. If Sprint's customers were to be prohibited from attaching femtocells to their personal broadband wireline network access or their devices were prohibited from attaching to WiFi networks, or if the access were degraded or subject to discriminatory fees, Sprint's customers would be significantly harmed because they

would lose the benefits of the stronger signals and faster speeds that femtocells and WiFi networks provide.

3. An adverse cost and quality impact on Sprint and the other small wireless competitors would be highly detrimental to competition in the wireless industry.

To the extent Sprint continues to build its network and its costs are raised, Sprint may have no choice but to pass some of the increased costs to its customers. The result would be consumer harm, and Sprint would become a less effective wireless competitor. While AT&T may be able to protect itself from similar backhaul rate increases because it controls its own ILEC territory, other carriers will also be weakened.

Higher network access costs would reduce Sprint's ability to invest in network upgrades. A substantial increase in its broadband wireline network access costs would dissipate already scarce capital that Sprint needs to maintain a quality network at competitive prices for its customers. Significantly raising the variable and fixed costs of smaller competitors like Sprint and/or reducing the quality of the service they offer, will curtail their ability to constrain the pricing of market-dominating Verizon and AT&T. The market will progress towards a wireless duopoly, with higher prices and less innovation.

4. The Commercial Agreements provide Verizon and the Cable Companies with the incentives to reduce competition in the provision of broadband access to Sprint and other small wireless competitors.

As duopoly competitors in the provision of the broadband wireline network access essential input in their overlap territories, Verizon and the Cable Companies have mutual incentives to eliminate competition among themselves and raise prices to the monopoly level. Moreover, while a non-integrated supplier would at least avoid charging its customers so much as to put their businesses in danger, Verizon will gain additional benefits from charging higher input prices or offering inferior network access to its smaller competitors because it can capture additional profits as a result of weakened wireless service competition.

This creates an incentive for Verizon to charge high input prices or offer degraded access. As agents or resellers of Verizon wireless service and as Verizon's partners in long term agreements, the Cable Companies have the incentive to support Verizon with similar conduct.

As a result of the joint venture created by the Commercial Agreements, Verizon² and the Cable Companies have incentives to act in each others' best interests. Because they can maximize their mutual benefits by discriminating against Verizon's competitors, they will have the incentives to deny, impede, or degrade access to WiFi, backhaul and femtocell access, or otherwise discriminate against Sprint.

Both unilateral and coordinated incentives result from the Commercial Agreements. Even if the increase in the Cable Companies' unilateral incentives flowing from the agreements may be modest, the coordinated incentives of both Verizon and the Cable Companies are particularly powerful because they result from a "mutual hostage" situation. Verizon and the overlapping Cable Company in a territory each has the ability to punish or reward the other by its actions: Verizon could ramp up the FiOS expansions that it stopped shortly before the Commercial Agreements were reached, either by increasing promotion of FiOS or by expanding into new territories. The Cable Companies could punish Verizon by providing Sprint and other small carriers with low cost and high quality WiFi access that could help close the gap between their network capacity and Verizon's.

Incentives to coordinate can result in anticompetitive conduct, even where the parties are not under mutual control. In *United States v. Dairy Farmers of America*, the court explained that focusing an inquiry only on explicit control "ignores the fact that [the parties] have closely aligned interests to maximize profits via anticompetitive behavior."³

5. The Commission has the authority to impose non-discrimination conditions on the Applicants.

² Although Verizon Communications, Inc. and Verizon Wireless are separate legal entities, Verizon Wireless will act in the interests of its controlling parent company.

³ 426 F.3d 850, 861 (6th Cir. 2005). See also *Applications of VoiceStream Wireless Holding Corp. and Aerial Communications Inc. for Consent to Transfer*, 15 FCC Rcd 10089 (2000), ¶ 25 (Commission "recognizes that joint ownership interests may afford a non-controlling interest holder the opportunity to influence the conduct of the controlling partner"); *News Corporation, The DIRECTV Group Inc., and Liberty Media Corporation*, 23 FCC Rcd 3265 (2008), ¶ 45 (citing *Dairy Farmers*).

As Sprint and other concerned parties have previously demonstrated, the Commercial Agreements are inextricably part of the spectrum assignment transaction.⁴ The spectrum would not have been offered for sale, but for the advantages to the Cable Companies provided through the Commercial Agreements. Thus, the Commission's review of the harmful aspects of the arrangements falls clearly within the jurisdiction provided by Section 310(d) of the Communications Act, requiring the Commission to find that the public interest, convenience, and necessity will be served by the transactions.

In previous situations, the Commission has relied on Section 310(d) when it recognized the danger in cooperative arrangements that could adversely affect the competitive incentives of the parties beyond the scope of the venture itself. For example, where two of three competitors serving a territory were about to become indirectly commonly controlled, the Commission found that they could be expected to compete less vigorously with each other. "Diminished competition could serve to increase both firms' revenues. Shareholders would benefit from such an outcome, while consumers would be harmed. Diminished competition could take various forms. . . [They] would have little incentive to undercut the other's price and could even be expected to match the other's price increase or quality reduction. Likewise, each firm could be expected to scale back promotional and marketing activities or service improvements designed to lure away the other firm's subscribers. Moreover, neither firm would have to explicitly communicate this strategy to the other in order for it to be effective."⁵ The Commission ultimately determined that a remedial condition was necessary to mitigate the public interest harm that was likely to arise from the transaction.⁶

Efforts to deny or impede access to subscriber-provided Internet connections for femtocells or WiFi offload would violate the Open Internet prohibitions of blocking and unreasonable discrimination. Accordingly, the Commission may also

⁴ See, e.g., Reply Comments of Sprint Nextel Corporation in WT Docket No. 12-4 (2012), pp.3-7 (quoting David L. Cohen, Executive Vice President of Comcast, "The transaction is an integrated transaction. There was never any discussion about selling the spectrum without having the commercial agreements.").

⁵ *News Corporation, The DIRECTV Group Inc., and Liberty Media Corporation*, 23 FCC Rcd 3265 (2008), ¶¶ 38-39.

⁶ *Id.*, ¶ 40.

rely on Section 706 of the 1996 Telecommunications Act⁷ for its authority to impose conditions on the Applicants.⁸

The Commission may also find authority in other provisions of the 1996 Act, which envisioned healthy competition between the ILEC and Cable Company as the great hope for increasing consumer choices and reducing charges. The arrangements between Verizon and the Cable Companies unite the owners of these two wired networks in a common enterprise through which they each can profit from the other's success. This certainly interferes with the basic precepts of the Act.⁹

6. There are advantages to the Commission acting now to mandate conditions in order to deter this elimination of competition.

The potential harms to wireless competition are best addressed now. Waiting until wrongdoing is detected and only then initiating investigation and enforcement actions could create delays and irrevocable harms in the wireless market. If Sprint and other wireless providers cannot increase their network capacity to keep pace with growing demand, they may fall permanently behind Verizon. Given the potential to obtain a permanent advantage, Verizon and the Cable Companies may not be deterred by the possibility of an enforcement action, as they would be by conditions that the Commission could impose on them now.

Proposed Conditions

To remedy the problems that the Sprint representatives described, they proposed that the Commission impose discrete conditions on its consent to the applications now under consideration. Such conditions should include:

- The parties must not market (or profit from) each others' services in areas where a Cable Company competes with Verizon's wired network.

⁷ 47 U.S.C. § 1302.

⁸ *Preserving the Open Internet; Broadband Industry Practices*, 25 FCC Rcd 17905 (2010), ¶¶ 117-123.

⁹ *See, e.g.*, Comments of Sprint Nextel Corporation in WT Docket No. 12-4 (February 21, 2012), pp. 3-4.

- The Joint Venture among Verizon and the Cable Companies must make its technology available to all wireless carriers and their subscribers pursuant to non-discriminatory terms and conditions.
- Verizon Communications and the Cable Companies must not restrict the use of their Internet access facilities for connection by femtocells and other small cells.
- Cable Companies that operate WiFi networks must provide nondiscriminatory access to subscribers of all wireless networks, including log-in, authentication, data priority/speed, and hand-off procedures no less favorable than those provided to Verizon subscribers.
- Cable Companies and the Verizon ILEC must provide backhaul services to wireless carriers on a non-discriminatory basis, with costs proportional to the requested capacity of a line.

These conditions would ameliorate some of the anticompetitive effects that otherwise would arise from the transactions and would serve the public interest.

Sincerely,

/s/

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Counsel to Sprint Nextel Corporation

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